U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 05236403

DATE: JAN. 24, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, an information technology consulting business, seeks to employ the Beneficiary as a senior systems engineer. It requests classification of the Beneficiary as an advanced degree professional under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the ground that the Beneficiary was barred from receiving the requested immigration benefit under section 204(c) of the Act because the Petitioner did not establish that the Beneficiary's marriage to a U.S. citizen was a *bona fide* marital relationship that was not entered into for the sole purpose of evading U.S. immigration law.

On appeal the Petitioner asserts that no finding of marriage fraud has ever been made against the Beneficiary by U.S. Citizenship and Immigration Services (USCIS) in this proceeding, or any earlier proceeding, and that the existence of a *bona fide* marital relationship is demonstrated by the evidence of record. Accordingly, the Petitioner claims that the Beneficiary is not subject to the statutory marriage fraud bar and asserts that he qualifies for the requested visa classification based on the documentation of record.

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration and the issuance of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

Section 204 of the Act, 8 U.S.C. § 1154, governs the procedures for granting immigrant status. Subsection (c) of section 204 provides that:

> Notwithstanding the provisions of subsection (b)[1] no petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General[2] to have been entered into for the purpose of evading the immigration laws or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

Thus, section 204(c) of the Act provides that no family- or employment-based immigrant petition shall be approved if the alien has entered into a marriage, or attempted or conspired to do so, for the purpose of evading U.S. immigration laws.

II. ANALYSIS

A. Applicability of Marriage Fraud Bar

The instant petition, Form I-140, Immigrant Petition for Alien Worker (I-140 petition), was filed in November 2018. In a notice of intent to deny (NOID) the Director recounted the Beneficiary's previous history in the U.S. immigration system. The Director indicated that the Beneficiary first entered the United States on a student (F-1) visa in January 2010 and married a U.S. citizen in [redacted] 2011. In February 2012 the Beneficiary's spouse filed a Form I-130, Petition for Alien Relative (I-130 petition), on behalf of the Beneficiary. In October 2012 this petition was withdrawn by the Beneficiary's wife for the stated reason that the Beneficiary had abandoned the marriage and she was filing for a divorce, though no divorce ensued. A second I-130 petition was filed by the Beneficiary's wife in May 2013. This petition was denied by USCIS in October 2013 on the ground that the petitioner did not establish that her marriage to the Beneficiary was entered in good faith and not for immigration purposes. A third I-130 petition was filed by the Beneficiary's wife in March 2014. This petition was denied by USCIS in October 2014 on the same ground as the previous petition – specifically, that the petitioner did not establish that she had a *bona fide* marriage which the Beneficiary entered into in good faith rather than solely to circumvent U.S. immigration laws. A fourth I-130 petition was filed by the Beneficiary's wife in December 2014, which is still pending.[3]

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[1] Subsection (b) of section 204 of the Act refers to preference visa petitions, both family based and employment-based, that are verified as true and forwarded to the State Department for issuance of a visa.

[2] In *Matter of Samsen*, 15 I&N Dec. 28 (BIA 1974), the Board of Immigration Appeals held that a determination of marriage fraud is to be made on behalf of the Attorney General by the district director in the course of adjudicating the subsequent visa petition.

[3] In connection with each of the I-130 petitions filed by his wife, the Beneficiary filed a Form I-485 application to adjust status. The first three were denied and the fourth, like the associated I-130 petition filed by his wife, is still pending.

In the NOID the Director stated that USCIS, in deciding whether a beneficiary is barred under section 204(c) of the Act from obtaining immigrant status, conducts an independent evaluation of the record to determine if there is substantial and probative evidence that the marriage at issue was entered into for the purpose of evading U.S. immigration laws, citing *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). The Director quoted from *Matter of Laureano*, 19 I&N Dec. 1 at 3 (BIA 1983), in which the Board of Immigration Appeals stated that evidence of a marriage's *bona fides* at inception could take the form of "proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence, and experiences."

In response to the NOID the Petitioner submitted copies of several documents already in the record and a letter with a list of additional documentation which had been submitted to USCIS in response to a separate NOID issued in November 2018 on the fourth I-130 petition filed by the Beneficiary's wife. The documentation identified in this letter, submitted in support of the claim that the Beneficiary and his wife had a *bona fide* marriage, was not submitted with the Petitioner's response to the NOID in the instant I-140 petition. The Director found that the failure to submit this documentation precluded a material line of inquiry, which was grounds for denying the petition, citing the regulation at 8 C.F.R. § 103.2(b)(14). The Director concluded that the Petitioner had not met its burden of proof that the Beneficiary was entitled to the immigration benefit sought in this proceeding.

On appeal the Petitioner submits copies of the documents previously submitted to USCIS in response to the NOID on the I-130 petition, as well as some additional documents. The Petitioner asserts that these materials demonstrate the *bona fides* of the marriage relationship between the Beneficiary and his wife. The Petitioner also points out that USCIS has never made an affirmative finding that the Beneficiary and his wife engaged in marriage fraud. What USCIS has found in prior decisions is that the evidence was insufficient to establish the *bona fides* of a marital relationship. Further in this vein, the Petitioner quotes an excerpt from the BIA's appellate decision on the third I-130 petition filed by the Beneficiary's wife. While dismissing that appeal in April 2015, the BIA stated:

> Although the petitioner has not met her burden of establishing a bona fide marriage by a preponderance of the evidence, we do not find the evidence sufficient to conclude that the petitioner's marriage is fraudulent, *i.e.*, that it was entered into for the purpose of circumventing the immigration laws. *See Matter of McKee*, 17 I&N Dc. 332 (BIA 1980). The petitioner may file a new visa petition on the beneficiary's behalf that is supported by competent evidence that the beneficiary is entitled to the status sought under the immigration laws.

In re: [redacted], *Beneficiary of a visa petition filed by* [redacted], *Petitioner* (BIA [redacted] 2015). Thus, based on the entire record, including the documentation submitted in response to the NOID issued on the third I-130 petition, the Board of Immigration Appeals found that the Beneficiary and his wife had not established the *bona fides* of their marriage, but that the evidence did not support a conclusion that they had committed marriage fraud.

The Director has not reviewed the documentation cited in the Petitioner's I-140 NOID response, which was submitted to USCIS in response to the NOID on the third I-130 petition. Nor has the Director seen the additional documentation submitted on appeal in this proceeding. Accordingly, we will remand this case for further consideration. The Director shall review the newly-submitted documentation and determine whether the evidence as a whole establishes that section 204(c) of the Act applies in this case.

B. Petitioner's Ability to Pay the Proffered Wage

A petitioner must establish its ability to pay the proffered wage stated in the labor certification from the priority date[4] of the petition onward. As provided in the regulation at 8 C.F.R. § 204.5(g)(2), evidence of this ability to pay shall be in the form of copies of annual reports, or federal tax returns, or audited financial statements.[5]

The proffered wage in this case is $101,525 per year and the priority date is February 19, 2018. The record shows that the Beneficiary has been employed by the Petitioner since before the priority date. The record includes copies of the Forms W-2, Wage and Tax Statements, issued to the Beneficiary for 2017 and earlier years, but none for 2018 or 2019. Thus, the record does not show whether the Beneficiary's pay has equaled or exceeded the proffered wage since the priority date. Furthermore, the record does not include any annual reports, federal tax returns, or audited financial statements for the Petitioner, either before or after the priority date. Based on the current record, therefore, it is not possible to determine whether the Petitioner has had the ability to pay the proffered wage from the priority date onward.

Accordingly, on remand the Director should request regulatory required evidence, in accordance with 8 C.F.R. § 204.5(g)(2), of the Petitioner's ability to pay the proffered wage from the priority date onward. The Petitioner may also submit additional materials in support of the factors discussed in *Matter of Sonegawa*, 12 I&N Dc. 612, 614-15 (Reg'l Comm'r 1967), which permits USCIS to consider the totality of the circumstances affecting a petitioner's ability to pay the proffered wage.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of whether section 204(c) of the Act applies to this matter, and whether the Petitioner has had the ability to pay the proffered wage from the priority date onward.

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[4] The "priority date" of the petition is the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

[5] In appropriate cases other types of evidence may be submitted such as profit/loss statements, bank account records, personnel records, and, in the case of a petitioner with more than 100 U.S. employees, a statement from a financial officer establishing its ability to pay the proffered wage.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.